**IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**

**SPECIAL CIVIL APPLICATION No. 26517 of 2006**
**With**
**SPECIAL CIVIL APPLICATION No. 26460 of 2006**
**With**
**SPECIAL CIVIL APPLICATION No. 26462 of 2006**
**To**
**SPECIAL CIVIL APPLICATION No. 26469 of 2006**
**With**
**SPECIAL CIVIL APPLICATION No. 26483 of 2006**
**To**
**SPECIAL CIVIL APPLICATION No. 26493 of 2006**
**With**
**SPECIAL CIVIL APPLICATION No. 26495 of 2006**
**To**
**SPECIAL CIVIL APPLICATION No. 26498 of 2006**
**With**
**SPECIAL CIVIL APPLICATION No. 26509 of 2006**
**To**
**SPECIAL CIVIL APPLICATION No. 26516 of 2006**
**With**
**SPECIAL CIVIL APPLICATION No. 26459 of 2006**

**For Approval and Signature:**

**HONOURABLE MR.JUSTICE AKSHAY H.MEHTA**

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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**ORIENTAL INSURANCE COMPANY LTDTHRO'AUTHORISED SIGNATORY. - Petitioner(s)**

**Versus**

**DAKSHBEN INDUGIRI GOSAI. & 3 - Respondent(s)**

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**Appearance :**

MR MAULIK J SHELAT for Petitioner(s) : 1,
None for Respondent(s) : 1 - 2.
MR ARVIND THAKUR with MS. SHAH for Respondent(s) : 1.2.1, 1.2.2, 1.2.3, 1.2.4, 1.2.5, 4,
UNSERVED-REFUSED (R) for Respondent(s) : 2.2.1
DS AFF.NOT FILED (R) for Respondent(s) : 3,
MR BIPIN I MEHTA for Respondent(s) : 4,

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**CORAM : HONOURABLE MR.JUSTICE AKSHAY H.MEHTA**

**Date : 29/06/2007**

**COMMON CAV JUDGMENT** :

This group of petitions, filed essentially under Article 227 of the Constitution of India, is directed against order passed below Exh. 73 in M.A.C. Petition No. 403 of 2005 and other allied matters by the Motor Accident Claims Tribunal {Aux.] Amreli dated 31/8/2006, hence they are heard together and now they are being disposed of by this common CAV Judgment.

2. The proceedings of M.A.C. Petition No. 403 of 2005 and its allied matters have arisen on account of vehicular accident which occurred on 21/2/1994. On that day several persons were travelling in a goods vehicle bearing Registration No. GJ-1-U-7527. It was proceeding towards Savarkundla. On way, there was unmanned railway crossing. When the vehicle approached the railway crossing, the passengers noticed a train coming from the side of village Dhola and going towards Savarkundla. The passengers shouted to halt the vehicle, but respondent no. 3 did not respond to them and continued to drive

the vehicle. As a result of the same, while it was crossing the railway track, the train collided with it causing the accident. About five persons lost their lives and others got injured. The victims and/or the relatives of the victims preferred Motor Accident Claim Petitions for claiming compensation before the Motor Accident Claims Tribunal, initially at Bhavnagar but subsequently the proceedings have now been transferred to M.A.C. Tribunal at Amreli. They are numbered as M.A.C. Petitions No. 403 of 2005 to 437 of 2005.

2.1. Pending the proceedings, the petitioner, which is the Insurance Company of the offending vehicle, submitted an application at Exh. 73 praying for deleting it from the proceedings because according to the petitioner, the victims were travelling in a goods vehicle as passengers and, therefore, their risk was not covered under the policy. In other words, it was contended by the petitioner that Insurance Company was not liable to satisfy the award because the accident occurred on 21/2/1994; that is prior to amendment effected in section 147 of the Motor Vehicles Act [hereinafter referred to as 'the Act']. It was further contended that the petitioner was joined as party to the proceedings in view of the decision of the Apex Court rendered in the case of New India Assurance Co. Ltd., v/s. Satpal Singh reported in 1999 AIR SCW 4337, however, the said decision has been overruled by Larger Bench of the Supreme Court by decision rendered in the case of New India Assurance Co. Ltd., v/s. Asha Rani reported in AIR 2003 S.C. 607. It was further contended by the petitioner that the Apex Court in Asha Rani's case held that the insurance

company was not liable to satisfy the award in case of passengers travelling in goods vehicle. The said application was resisted by the claimants as well as the insured. It may be noted here that initially the Railway i.e., Union of India was not joined as party opponent, but subsequently on the application of the petitioner it was impleaded as party opponent. The Tribunal held that at this stage it was difficult to accept request of the petitioner and delete it from the proceedings. According to the Tribunal, the parties were still to lead evidence in the case and in that view of the matter, it was premature to accept the contention of the petitioner and to delete it from the proceedings. It has, therefore, rejected the said application. Hence, these petitions.

3. I have heard Mr. Maulik J Shelat, learned advocate for the petitioner and Mr. Bipin Mehta & Mr. Arvind Thakur, learned advocates for the respondents. Mr. Shelat has contended that when the proceedings were filed before the Tribunal, law laid down by the Apex Court in Satpal's case [supra] was good law and, therefore, the petitioner was joined as opponent. However, the said decision has been overruled in Asha Rani's case and it has been held that insurance company is not liable to satisfy the award if the claimants are travelling as passengers in goods vehicle. He has submitted that the law on this issue has now been crystalised by the Larger Bench. He has further submitted that it is clear from the pleadings that the claimants were travelling as passengers in a goods vehicle, hence the liability of the insurance company was not there and there was no need to join it as opponent. According to Mr.

Shelat, this will not only cause unnecessary harassment to the petitioner, but it will result into wanton waste of public money and public time. According to him, when the law on the point is very clear and when the petitioner in all circumstances is likely to be exonerated, there was no point in continuing it in the proceedings. He has placed reliance on several decisions of the Apex Court as well as this Court to substantiate his submissions.

3.1. As against that, Mr. Bipin Mehta and Mr. Thakur have argued that the application before the Tribunal at Exh. 73 itself was not maintainable since it was at a premature stage. According to them, when the entire trial is still pending and the petitioner company has to establish and prove defences available to it under section 149 of the Act, the Tribunal has rightly rejected the applications of the petitioner. They have further submitted that it would not be proper for this Court to delete the insurance company from the proceedings at the preliminary stage. They have submitted that applications made under section 140 are still pending where neither the negligence nor the liability is required to be seen. According to them, if the insurance company is deleted from the proceedings, it will render the respondents almost remedy-less. They have also placed reliance on the decisions of this Court.

4. Having carefully considered the rival submissions and upon perusal of the impugned order as well as record of the petitions, it appears that on the date of accident certain persons, approximately 60 in number, were travelling by offending vehicle. They had started from village Dhamel to go to

Badhada to attend marriage. It was alleged that the driver of offending vehicle, namely respondent no. 3 was driving it rashly and negligently and at high speed. The passengers asked him to slow down the vehicle but he did not listen to them. On the contrary, he had switched on the cassette player at high volume. When they approached unmanned railway crossing, seeing the sign board, the inmates of the vehicle noticed a train approaching the crossing and they shouted to stop the vehicle, but respondent no. 3 did not stop it. As a result of the same, while the vehicle was about to cross the railway tracks, the engine of the train collided with it and five persons lost their lives, whereas others got injured. Now in view of the submissions of the petitioner that it is not liable to satisfy the award and it should be deleted, the important questions which are to be decided amongst others are that if the driver is found negligent, then whose liability it is to satisfy the award and whether the insurance company can be deleted at this stage.

5. The petitioner has been joined on the ground that it has issued the insurance policy in respect of public carrier bearing registration no. GJ-1-U-7527, which is the offending vehicle and since the insured i.e., the owner was vicariously liable for the act of his employee i.e., the driver, the insurance company was statutorily as well as contractually bound to indemnify the owner for the liability arising qua third party. So far as the insurance policy of the offending vehicle is concerned, it is an admitted fact that the policy is issued by the petitioner. The petitioner has, however, filed application to delete it as

according to the petitioner, at the time when the claims were lodged and the pleadings were filed, law laid down in Satpal Sing's case was holding the field and the position of law was that the insurance company was required to indemnify the owner for the liability arising in respect of passengers in goods vehicle also. But later on the decision rendered in Satpal's case has been over-ruled by the Apex Court by decision rendered in the case of New India Assurance Co. Ltd., v/s. Asha Rani & ors., reported in 2003 (2) S.C.C. 223.

5.1. I have carefully perused the said decision. The question that was considered by the Apex Court was whether the insurer was liable to pay compensation to the dependents of the deceased passengers while the deceased passengers were travelling in a goods vehicle and that vehicle met with an accident on account of which the passengers died or suffered grave injury. The Apex Court has observed as under :-

> “26. In view of the changes in the relevant provisions in 1988 Act vis-a-vis 1939 Act, we are of the opinion that the meaning of the words “any person” must also be attributed having regard to the context in which they have been used i.e., 'a third party'. Keeping in view the provisions of 1988 Act, we are of the opinion that as the provisions thereof do not enjoin any statutory liability on the owner of a vehicle to get his vehicle insured for any passenger travelling in a goods vehicle, the insurers would not be liable therefor.
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> 27. Furthermore, sub-clause (i) of clause (b) of sub-section (1) of Section 147 speaks of liability which may be incurred by the owner of a vehicle in respect of death of or bodily injury to any person or damage to

any property of a third party caused by or arising out of the use of the vehicle in a public place, whereas sub-clause (ii) thereof deals with liability which may be incurred by the owner of a vehicle against the death of or bodily injury to any passenger of a public service vehicle caused by or arising out of the use of the vehicle in a public place.

28. An owner of passenger carrying vehicle must pay premium for covering risks of the passengers. If a liability other than limited liability provided for under the Act is to be enhanced under an insurance policy, additional premium is required to be paid. But if the ratio of this Court's decision in New India Assurance Company v/s. Satpal Singh and others [2000] 1 S.C.C. 237 is taken to its logical conclusion, although for such passengers the owner of a goods carriage need not to take out an insurance policy, they would be deemed to have been covered under the policy wherefor even no premium is required to be paid.

29. We may consider the matter for another angle. Section 149 (2) of the 1988 Act enables the insurers to raise defences against the claim of the claimants. In terms of clause 2 (a)(i)(c) of section 149 of the Act, one of the defences which is available to the insurer is that the vehicle in question has been used for a purpose not allowed by the permit under which the vehicle was used. Such a statutory defence available to the insurer would be obliterated in view of the decision of this Court in Satpal Singh's case [supra]."

While relying upon this decision, it is pleaded by the petitioner that the offending vehicle is a goods vehicle and the victims were travelling as passengers in the said vehicle and hence insurance company would not be liable.

6. Mr. Maulik Shelat has also relied upon decision rendered by the

Apex Court in the case of M/s. National Insurance Co. Ltd., v/s. Baljit Kaur and others reported in (2004) 2 S.C.C. p.1, in which it is held as under:-

> "20. It is, therefore, manifest that in spite of the amendment of 1994, the effect of the provision contained in Section 147 with respect to persons other than the owner of the goods or his authorized representative remains the same. Although the owner of the goods or his authorized representative would now be covered by the policy of insurance in respect of a goods vehicle, it was not the intention of the legislature to provide for the liability of the insurer with respect to passengers, especially gratuitous passengers, who were neither contemplated at the time of contract of insurance was entered into, nor was any premium paid to the extent of the benefit of insurance to such category of people.
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> 21. The upshot of the aforementioned discussions is that instead and in place of the insurer the owner of the vehicle shall be liable to satisfy the decree. The question, however, would be as to whether keeping in view the fact that the law was not clear so long such a direction would be fair and equitable. We do not think so. We, therefore, clarify the legal position which shall have prospective effect. The Tribunal as also the High Court had proceeded in terms of the decision of this Court in Satpal Singh. The said decision has been overruled only in Asha Rani. We, therefore, are of the opinion that the interest of justice will be subserved if the appellant herein is directed to satisfy the awarded amount in favour of the claimant, if not already satisfied, and recover the same from the owner of the vehicle. For the purpose of such recovery, it would not be necessary for the insurer to file a separate suit but it may initiate a proceeding before the executing court as if the dispute between the insurer and the owner was the subject-matter of determination before

the Tribunal and the issue is decided against the owner and in favour of the insurer. We have issued the aforementioned directions having regard to the scope and purport of Section 168 of the Motor Vehicles Act, 1988, in terms whereof, it is not only entitled to determine the amount of claim as put forth by the claimant for recovery thereof from the insurer, owner or driver of the vehicle jointly or severally but also the dispute between the insurer on the one hand and the owner or driver of the vehicle involved in the accident insmuch as can be resolved by the Tribunal in such a proceeding."

7. Mr. Shelat has cited other decisions which are on the same line. These decisions are of the Apex Court and are rendered in the cases of National Insurance Co. v/s. Bommithi and ors. Reported in (2005) 12 S.C.C. 243, National Insurance Co., v/s. Challa Bharathamma reported in 2004 ACJ 2094 and in the case of New India Assurance Co. Ltd., v/s. Ved Vatti and ors., reported in 2000 (3) Scale at page 397. According to Mr. Shelat, the Apex Court has now examined all the aspects of the question whether risk of passengers travelling in a goods vehicle is required to be covered by the insurance company and has crystalised the law on this issue; hence insurance company, in the present case, is not necessary party as no liability can be fastened upon it because admittedly the victims of the accident were travelling as passengers in a goods vehicle.

7.1. In support of his submission, he has placed reliance on the provisions contained in Order 1 of Civil Procedure Code and in particular Rule 3 thereof. It reads as under :-

> "**3. Who may be joined as defendants.-** All persons may be joined in one suit as defendants where -
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> (a) any right to relief in respect of, or arising out of, the same act or transaction or series of acts or transactions is alleged to exist against such persons, whether jointly, severally or in the alternative; and
>
> (b) if separate suits were brought against such persons, any common question of law or facts would arise."

It is his contention that in view of the law laid down by the Apex Court in the decision rendered in the case of Asha Rani [supra] no right to relief in respect of any act or transaction exists against the insurance company and hence it cannot be said to be necessary party and, therefore, the petitioner is required to be deleted from the proceedings.

8. The submission of Mr. Shelat though appears to be attractive, it requires detailed consideration before its acceptance or rejection. It is to be noted here that it is not the case of the petitioner that there was no contract of insurance existing between the insured and the petitioner on the date of accident. It is also not the case of the petitioner that it was not liable to indemnify the insured in respect of his liability that would arise in respect of death or bodily injury caused to any person in a vehicular accident. The sole submission is that since as per Asha Rani's case the petitioner is not required to cover the risk of passengers in goods vehicle, it is not liable to indemnify the insured since they are not falling under the category of *'any person*'. Here it is

necessary to state that for culling out the favourable facts, the petitioner has placed reliance on the FIR lodged in respect of the accident as also the claim petition. In the FIR it is stated that the victims were travelling in vehicle being public carrier bearing Registration No. GJ-1-U-7527 on 21/2/1994 as a part of marriage procession of son of Bavaji Umedpari Ravpari'. Whereas in the claim petition, particularly in M.A.C. Petition No. 403 of 2005 it is stated that the victims were travelling to fulfill religious commitment and for singing devotional songs at a particular place. Copy of the application is annexed to the petition at Annexure-C. It also emerges that deceased of that case had paid fare for travelling in the vehicle. Be that as it may, when it prima-facie appears that the victims were travelling in the goods vehicle as passengers, whether the plea of the petitioner can be accepted at this stage to delete it.

9. The plea raised by the petitioner is its defence and in usual circumstances such defence can be considered only upon the evidence that may be adduced before the Tribunal during the inquiry or trial. It is true that the Apex Court has absolved the insurance company from its liability to satisfy the award in the decisions rendered in the cases referred to above, but those decisions have been rendered only after completion of the full-fledged inquiry or trial. There is, therefore, every possibility that the claimant and the insured may have a chance, despite the prima-facie facts on record, to try and to lead evidence and prove that petitioner is liable to satisfy the award.

9.1. In the case of New India Insurance Co. v/s. Asha Rani [supra] the

question that is raised by the Apex Court for its consideration is that whether the insurer was liable to pay compensation to the dependents of the deceased passenger while the deceased passenger was travelling in a goods vehicle and that vehicle met with an accident, on account of which the passenger died or suffered bodily injury. The Apex Court has thereafter considered the relevant provisions as existing in the Act of 1939 and now in the Act of 1988 and arrived at a conclusion that the careful scrutiny of the provisions [section 147 of 1988] makes it clear that prior to the amendment of 1994 it was not necessary for the insurer to insure against owner of the goods or his authorized representatives being carried in a goods vehicle. The Apex Court has also considered the case from another angle i.e., by keeping in view the defences available to the insurance company as specified in section 149 (2) of the Act of 1988 and particularly clause [c] of sub-sec. (i) wherein the defence is provided to the insurer that the vehicle in question was used for a purpose not allowed by the permit under which the vehicle was used. The Apex Court therefore observed that if the insurance company is required to cover the risk of passengers in goods vehicle, the statutory defence available to the insurer would be obliterated. Similar view has been taken by the Apex Court in the cases of National Insurance Co. v/s. Swaran Singh reported in (2004) 3 SCC p.297, National Insurance Co. v/s. Bommithi [supra] and New India Insurance Co. v/s. Ved Vatti [supra]. In these cases it has been held that gratuitous passengers travelling in goods vehicle were not covered under the policy of

insurance. The Apex Court in aforesaid decisions has kept in view the difference between the definitions of goods vehicle occurring in the Act of 1939 and the goods carriage in the Act of 1988 and has held that the travelling of passengers in a goods vehicle was not at all in contemplation while enacting the Act of 1988.

9.2. A careful study of the aforesaid decisions clearly show that these decisions are based on the proven facts. It is also clear that certain eventualities which may possibly occur in the present case during the course of trial, have not been referred to in those cases. In other words, certain aspects such as whether the insured or owner of the offending vehicle had obtained temporary permit for carriage of passengers in goods carriage, etc., were not for consideration before the Apex Court. The owner of the goods vehicle or goods carriage is entitled to obtain a permit for carriage of passengers and he may be authorized to use the vehicle temporarily for the conveyance of the passengers, if he so chooses, as per sub-section (1) of section 87 of the Act which reads as under :-

> "**87. Temporary permits.-** (1) A Regional Transport Authority and the State Transport Authority may without following the procedure laid down in section 80, grant permits to be effective for a limited period which shall, not in any case exceed four months, to authorise the use of a transport vehicle temporarily-
>
> (a) for the conveyance of passengers on special occasions such as to and from fairs and religious gatherings, or
>
> (b) for the purposes of a seasonal business, or

(c ) to meet a particular temporary need, or

(d) pending decision on an application for the renewal of a permit,

and may attach to any such permit such condition as it may think fit;

Provided that a Regional Transport Authority or, as the case may be, State Transport Authority may, in the case of goods carriages, under the circumstances of an exceptional nature, and for reasons to be recorded in writing, grant a permit for a period exceeding four months, but not exceeding one year."

9.3. Thus, the Regional Transport Authority or State Transport Authority has been empowered by the Act to grant permit to be effective for limited period to authorise the use of the transport vehicle temporarily for conveyance of passengers on special occasions such as to and from fairs and religious gatherings, etc. Temporary permit can be issued to authorise the use of transport vehicle. The transport vehicle is defined in section 2 (47). It means *'a public service vehicle, a goods carriage, an educational institution bus or a private service vehicle'.* Thus, the goods carriage is covered under this section. Not only that, the proviso to section 87 (1) specifically refers to the case of goods carriages and states that under the circumstances of exceptional nature and for reasons to be recorded in writing, permit can be granted for a period exceeding four months but not exceeding one year. This provision certainly envisages carriage of passengers in a goods carriage. Naturally this can include the trip like the trip in the present case. It is, therefore, obvious that in the instant case, the insured has a scope to establish that on the day of trip, he

had valid permit duly issued under the provisions of section 87 of the Act and he was authorized to carry the passengers in a goods carriage. When the Act itself permits carriage of passengers in a goods carriage in certain circumstances, after obtaining requisite permit under section 87 of the Act, will the insurance company still be able to plead that it was not required to satisfy the award. In view of aforesaid, this is a question which is required to be considered; certainly not at this stage but only after the full-fledged trial.

10. A statutory provision is made in the Act to enable the insurance company to raise certain defences. It is settled position of law that if insurance company wants to avoid its liability, it can only fall back upon the defences available to it under section 149(2) of the Act and it can be exonerated when it establishes them. Section 149 (2) of the Act reads as under :-

> "**149. Duty of insurers to satisfy judgments and awards against persons insured in respect of third party risks.**
>
> (1) xxx xxx xxx
>
> (2) No sum shall be payable by an insurer under sub-section (1) in respect of any judgment or award unless, before the commencement of the proceedings in which the judgment or award is given the insurer had notice through the court or as the case may be, the Claims Tribunal of the bringing of the proceedings, or in respect of such judgment or award so long as execution is stayed thereon pending an appeal; and an insurer to whom notice of the bringing of any such proceedings is so given shall be entitled to be made a party thereto and to defend the action on any of the following grounds, namely :

(a) that there has been a breach of a specified condition of the policy, being one of the following conditions, namely :

(i) a condition excluding the use of the vehicle-

(a) for hire or reward, where the vehicle is on the date of the contract of insurance a vehicle not covered by a permit to ply for hire or reward; or

(b) for organised racing and speed testing; or

(c ) for a purpose not allowed by the permit under which the vehicle is used, where the vehicle is a transport vehicle; or

(d) without side-car being attached where the vehicle is a motor cycle; or

xxx xxx xxx xxx

(ii) a condition excluding driving by a named person or persons or by any person who is not duly licensed, or by any person who has been disqualified for holding or obtaining a driving licence during the period of disqualification; or

(iii) a condition excluding liability for injury caused or contributed to by conditions of war, civil war, riot or civil commotion; or

xxx xxx xxx xxx

(b) that the policy is void on the ground that it was obtained by the non-disclosure of a material fact or by a representation of fact which was false in some material particular."

Considering sub-clauses (a) and (c ) of sub-sec. (2)(a)(i), it is obvious that the burden to establish these facts is solely on the insurance company. The party which pleads particular case, the onus is on that party to prove it. It has to establish by leading cogent evidence that there was condition in the policy

excluding the use of vehicle for hire or reward where the vehicle on the date of contract of insurance not covered by permit to ply for hire or reward or for a purpose not allowed by the permit under which the vehicle is used, where the vehicle is a transport vehicle. In the case of National Insurance Co. v/s. Swaran Singh [supra] the Apex Court has held as under :-

> "62. The proposition of law is no longer *res integra* that the person who alleges breach must prove the same. The insurance company is, thus, required to establish the said breach by cogent evidence. In the event the insurance company fails to prove that there has been breach of conditions of policy on the part of the insured, the insurance company cannot be absolved of its liability. [See Sohan Lal Passi, 1996 ACJ 1044 (SC)]."

These facts, therefore, can be established by the insurance company only after leading cogent evidence. If the insurance company is deleted at the threshold of the proceedings, it will not only relieve the insurance company from its responsibility to discharge the burden and prove its defence, but also cause serious prejudice to the claimants as well as insured. At the same time, the claimant as well as the insured will have adequate opportunity to challenge the case of the insurance company by producing and proving the controverting facts and destroy the defence of the insurance company. For example, owner or the insured is within his bounds to bring evidence on record that the driver of his vehicle was not authorized to carry passengers but despite his mandate, the driver had carried the passengers without the knowledge of the owner. This can be had only in the course of a trial or inquiry and not otherwise. Even section

149 (2) categorically provides that "no sum shall be payable by an insurer in respect of judgment and award". In other words, the question of not paying/satisfying the amount of award arises only after judgment which is delivered after full-fledged trial. Therefore, it is not at all desirable that the insurance company i.e., the petitioner can be permitted to leave the proceedings at this stage.

10.1. In view of the aforesaid discussion, it is also necessary to refer to decision of this Court. The Full Bench of this Court in a decision rendered in the case of New India Assurance Co. Ltd. v. Kamlabehn, Wd/o. Sultansinh Hakumsinh Jadav reported in 1993 (1) G.L.H. p. 961 has held as under :-

> "..... that the insurer, in order to successfully disclaim his liability on the ground mentioned in Sec. 96(2)(b), has to establish :
>
> (i) that on the date of the contract of insurance, the insured vehicle was expressly or implicity not covered by a permit to carry any passenger for hire or reward,
>
> (ii) that there was a specified condition in the policy which excluded the use of the insured vehicle for the carriage of any passenger for hire or reward,
>
> (iii) that the vehicle was, in fact, used in breach of such specified condition on the occasion giving rise to the claim by reason of the carriage of the passenger therein for hire or reward and
>
> (iv) that the vehicle was used by the insured or at his instance in breach of specific conditions including a condition that in the goods vehicle passengers for hire or reward were not to be carried. If it is done without knowledge of the insured by the

driver's acts or omission, the insurer would be liable to indemnify the insured."

Though this case is considered in view of the provisions contained in the Act of 1939, the corresponding section i.e., section 149 (2) of the Act of 1988 also contains the identical provisions with regard to the defences available to the insurance company and, therefore, the requirement enumerated in this decision can squarely apply to the insurance company even in the present case also. Since this is closely connected with the first limb of argument of Mr. Shelat seeking exoneration of the petitioner and the Apex Court has considered the issue of passenger in goods carriage from different angle, I have discussed it here.

10.2. Mr. Shelat has placed reliance on some decisions to substantiate his plea that when no right to seek relief against a party is in existence, such party is not necessary party. As observed hereinabove that there is no dispute so far as issuance of policy by the petitioner is concerned. It cannot therefore, be said that no relief is in existence against the insurer. What is tried to aver by the petitioner is that in view of decision of Asha Rani's case, as it is not required to cover the risk of passengers in goods vehicle, the insurer would not be necessary party as no liability can be fastened upon it. This contention cannot be accepted at this stage in view of foregoing discussions and observations.

Apart from this, it cannot be denied that the petitioner is the

insurer of the offending vehicle and it has undertaken to discharge the liability arising under the Act. Under section 147 of the Act the insurance company insures a person or classes of persons specified in the policy to the extent specified in sub-section (2) against any liability which may be incurred by him in respect of the death or bodily injury or damage to any property of third party caused by or arising out of the vehicle in a public place. This is the position prior to 1994 amendment. It is also not in dispute that if the driver of the offending vehicle is found negligent, the owner of the vehicle would be liable to pay compensation for the death or bodily injury of the third party and in such case, the insurer will have to satisfy the liability incurred by the owner. The only disputed question is that the persons dead or injured in the present case were passengers in a goods carriage and hence the petitioner – insurance company is not required to cover the risk and discharge the liability incurred by the owner. But the questions that would still remain that the presence of the insurance company in the proceedings will be necessary to adjudicate the real controversy between the claimants and insured on one side and the insurance company on the other. It may also be kept in view that even if no relief can be claimed against the petitioner or in fact, it may not have been claimed against it, considering the fact that its presence would be appropriate for effective decision of the case. It can be a proper party if not necessary party. As already discussed above, if the insurance company is permitted to leave the proceedings at this stage, the concerned Tribunal may find it difficult to

adjudicate upon certain disputed issues which may be raised by the claimant or the insured during the course of the trial. Without the presence of the insurance company the Tribunal may find it difficult to give proper decision. In other words, even in the facts of the present case the petitioner – insurance company is a proper party since without its presence there may not be complete and final adjudication of the disputes that may be raised in the trial. Proper party is one without whom no effective order can be made. In view of the same, the petitioner, if it is not a necessary party, it is certainly a proper party and it cannot be deleted from the proceedings at this stage.

11. It is not out of place to mention here that the Apex Court in certain circumstances has directed the insurance company to satisfy the award at first instance and then recover the amount from the insured, even when the insurance company has not been held liable or able to establish that there has been breach of policy. This view has been taken by the Apex Court even after Asha Rani's case in the cases of Pramod Kumar Agrawal v/s. Mushtari Begum reported in (2004) 8 S.C.C. p.667, National Insurance Company v/s. Challa Bharathamma [supra] and National Insurance Co. Ltd., v/s. Smt. Kusum Rai reported in 2006 (2) G.L.H. p. 15. The claimants, therefore, will be at liberty to plead and successfully establish that they stand covered under the ratio laid down by the Apex Court in these cases and the insurance company be directed to first satisfy the award and then recover from the insured. If the insurance company is deleted at this stage, the scope for seeking this relief at any stage

i.e., before any forum will be lost to the claimants. For this reason also I do not think it desirable to hold that the insurance company is required to be deleted without going for full-fledged trial only at preliminary stage solely on the basis of the decisions relied upon by him which are delivered on proven facts after full fledged trial. Thus, the decisions relied on by Mr. Shelat cannot apply here, hence submissions of Mr. Shelat cannot be accepted.

Mr. Shelat has also cited one decision of the Apex Court rendered in Civil Appeal No. 2674 of 2007 in the case of Smt. Yallwwa v/s. National Insurance Co. Ltd. Dated 16/05/2007 to meet the argument of the otherside in respect of interim award under section 140 of the Act. However, in view of the foregoing discussion I do not think it necessary to consider and deal with the said argument.

12. In the circumstances, I am of the opinion that the decision of the Tribunal cannot be said to be erroneous which requires interference and hence the petitions are rejected with no order as to costs. Rule is discharged.

At this stage Mr. Shelat prays for extension of the interim relief granted earlier for further four months. M/s. Bipin Mehta and Arvind Thakur object to grant of extension. Considering the facts and circumstances of the case as well as the legal point involved, in my opinion, the request made by Mr. Shelat is reasonable and it is required to be accepted. Hence, the interim relief granted earlier shall stand extended for further period of three months from today.

[ Akshay H Mehta, J. ]

* Pansala.